Editor's note: Reconsideration denied by Order dated Sept. 28, 1988

KENNETH W. BOSLEY

IBLA 85-738, 86-323 Decided January 26, 1988

Appeals from a decision of the California Desert District Office, Bureau of Land Management, rejecting a right-of-way application for a wind farm and from a Notice of Realty Action announcing a sale of a tract of public land. CA-17205, CA-17646.

Decision respecting the right-of-way affirmed (IBLA 85-738); appeal of the sale dismissed (IBLA 86-323).

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications

   A decision to reject a right-of-way application for a wind-turbine generating facility will be affirmed where the record supports a finding that the right-of-way would be inconsistent with the purpose for which the tract of public land at issue is being managed.

2. Federal land Policy and Management Act of 1976: Sales--Public Sales: Generally--Rules of Practice: Appeals: Standing to Appeal

   Under 43 CFR 4,410,, standing to appeal is limited to a party to the case adversely affected by the decision appealed from. A party who expresses no intention to purchase an isolated tract of Federal land by submitting a competitive bid on the tract lacks standing to appeal the manner in which the sale is conducted.

APPEARANCES: Kenneth W. Bosley,, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Kenneth W. Bosley has appealed from an April 19,, 1985, decision of the California Desert District Office, Bureau of Land Management (BLM), rejecting his application for a right-of-way (CA-17205) to construct, operate, and maintain wind turbines on a certain tract of public land in sec. 36, T. 17 S., R. 6 E., San Bernardino Meridian, San Diego County, California. This case has been docketed by the Board as IBLA 85-738.

The reason given for the BLM decision was that the land sought by appellant for the right-of-way for wind-power development had been found suitable for disposal pursuant to "existing resource management objectives as outlined in [the] Escondido Management Framework Plan and Management Action Summary." The BLM decision further explained that the parcel of land was identified as too isolated for effective resource management and, hence, was being processed for direct sale to the existing grazing lessee pursuant to section 203(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713(a) (1982). In support of its decision to reject appellant's right-of-way application, BLM cited the regulation at 43 CFR 2802.4(a)(1).

Appellant also filed with BLM on October 21, 1985, a protest of the Notice of Realty Action (NORA), 1/ announcing the proposed sale (CA-17646) of the tract of public lands which included the land embraced in the right-of-way application. This protest was treated by BLM as a notice of appeal and forwarded to the Board where it has been docketed as IBIA 86-323. In view of the closely related factual context of these two appeals and the related issues, we have consolidated these cases for review by the Board.

In his statement of reasons for appeal of rejection of his right-of-way, appellant asserts BLM improperly refuses to approve any wind-farm development on public lands. Appellant contends that wind-powered generating facilities are a legitimate objective of public land management and are more in the public interest than sale of the land. Appellant argues the tract of land is not isolated and that there are wind turbines on adjoining private parcels. In a supplemental statement of reasons, appellant argues that BLM arbitrarily denied his right-of-way for a wind-farm the basis of the proposed sale of the land while contemporaneously approving a right-of-way for telephone line (CA-17072) to Pacific Bell across the same tract.

In his statement of reasons for appeal of the sale of the tract of public lands, appellant contends that the appraised value was too low. Appellant argues that a direct sale was improper because of the accessibility of the parcel by means of paved roads, increasing land values due to proximity to development in the San Diego area, and the potential interest of other bidders.

[1] The regulations at 43 CFR 2802.4(a)(1) and (2) cited by BLM in support of its decision rejecting appellant's right-of-way application provide that an application may be denied if it is determined by BLM that the right-of-way would be inconsistent with the purpose for which the public lands are managed or would not be in the public interest. The management framework plan referenced by the BLM decision addresses the scattered parcels of land situated between the Cleveland National Forest and the Mexican border (the area in which the subject tract is located):

1/ The NORA was published in the Federal Register (50 FR 36498 (Sept. 6, 1985)).

5. An individual parcel survey will be conducted to determine whether the lands are best suited to be managed under Bureau jurisdiction, transferred to other public ownership or to private ownership.

Rationale:

A broken, scattered land pattern is difficult to manage. Programs and plans cannot be written and implemented because of the uncertain tenure of the surrounding private lands. Trespass problems are accelerated. In order to help eliminate these problems and promote more efficient management, the larger, better blocked areas should be consolidated and the small isolated tracts disposed of unless they have some unique quality.

Bureau of Land Management, U.S. Department of the Interior, Management Framework Plan, Escondido-Border Planning Units (1975) at 69.

The subsequent NORA announced that the subject tract of land "has been examined and found suitable for disposal by direct sale at not less than the appraised fair market value pursuant to Section 203 of [FLPMA]." 50 FR 36498 (Sept. 6. 1985). The notice further explained that:

> The purpose of this direct sale is to dispose of public lands which because of location and existing private landownership patterns in the area [are] difficult and uneconomic to manage as part of the public lands and are not suitable for management by another Federal agency or department. The public interest will be well served by offering the subject land for sale.

Id. This finding comports with the statutory criteria for disposal found in section 203(a)(1) of FLPMA, 43 U.S.C. S 1713(a)(1) (1982).

Clearly the record supports BLM's finding that the proposed right-of-way is inconsistent with the purpose for which the subject tract of public land is being managed, i.e., disposal as a tract of land which is difficult and uneconomic to manage as part of the public lands. Although appellant challenges the finding that the tract is isolated, we note that this finding is predicated primarily on the lack of adjoining Federal lands rather than lack of accessibility. It appears from maps in the casefile that the tract of land at issue is, in fact, disconnected from other public land tracts. Accordingly, we find the decision to reject appellant's right-of-way application pursuant to the regulation at 43 CFR 2802.4(a)(1) is substantiated by the record. Approval of a right-of-way pursuant to section 501 of FLPMA, 43 U.S.C. § 1761 (1982), is a discretionary matter and a BLM decision rejecting a right-of-way application will ordinarily be affirmed where the record

shows the decision to be based on a reasoned analysis of the factors involved, made with due regard for the public interest. Dwane Thompson, 88 IBLA 31, 35 (1985).

We note that appellant has also asserted the decision was arbitrary in light of the contemporaneous grant of a right-of-way for a telephone line. The record discloses this right-of-way grant was issued for a linear right-of-way 5 feet in width along a pre-existing road. This Board has previously held that a right-of-way application for a wind-farm is properly treated as a request for a nonlinear right-of-way. Kenneth W. Bosley, 99 IBLA 327 (1987). This distinction in the nature of the rights-of-way would appear significant in terms of the encumbrance to be placed on land slated for sale, and, hence, we cannot conclude the decision was arbitrary.

With respect to appellant's appeal of the proposed sale as outlined in the NORA, we note as a preliminary matter that as an objection to a course of action proposed to be undertaken, this should have been treated by BLM as a protest, rather than an appeal. See 43 CFR 4.450-2; Kenneth W. Bosley, supra at 332. Thus, to the extent appellant has filed a timely protest of the proposed sale, jurisdiction to consider this protest lies with BLM rather than with this Board. Although we would ordinarily remand the protest for consideration by BLM, the Board has properly declined to do this where a remand would be a pointless exercise. See Beard Oil Co., 97 IBLA 66 (1987); Robert C. LeFaivre, 95 IBLA 26 (1986). As noted in our discussion, supra, the record before us supports the determination of BLM to sell the tract of land and appellant has presented nothing which would alter that conclusion. Thus, the protest of the determination to sell the tract would properly be subject to dismissal, and, hence, there is no point in remanding the protest.

[2] To the extent appellant is seeking to appeal the method by which the sale is to be conducted (i.e., direct sale, as opposed to competitive or modified competitive), we find no contention by appellant in the statement of reasons for appeal that he had any interest in purchasing the tract and that he sought to purchase the subject tract. In this particular, this case is distinguishable fran a similar appeal filed by appellant which was recently decided by the Board. In the latter case, the Board noted appellant's reference to "a number of parties, in addition to himself, who might have been interested in bidding on the parcel." Kenneth W. Bosley, supra at 334 (1987). (Emphasis added.) Standing to appeal is limited to a party to a case that has been adversely affected by a decision of BLM. 43 CFR 4.410. Absent an allegation that appellant expressed to BLM a desire to purchase the subject tract of land by making a competitive bid thereon, we conclude that appellant has not been adversely affected by the decision to sell the tract of land by direct sale (as opposed to competitive sale) and, hence, lacks standing to raise this issue before the Board. see George Schultz, 94 IBLA 173, 178 (1986); compare, Richard D. and Virginia Troon, 93 IBLA 256 (1986) (manner of sale reviewed on appeal of denial of protest by competing bidder). Thus, in this respect, the purported appeal of the terms of sale must be dismissed for lack of standing.

Assuming, arguendo, that appellant had standing to argue before the Board with respect to the method of sale used, we would be compelled to uphold the BLM decision for the reasons recited in detail in our decision in Kenneth W. Bosley, supra at 334-37.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision to reject appellant's right-of-way application is affirmed and the appeal of the NORA is dismissed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge